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No. 07-254

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IN THE

Supreme Court of the United States

TERMORIO S.A. E.S.P. and LEASECO GROUP, LLC,

Petitioners,

v

ELECTRIFICADORA DEL ATLANTICO S.A. E.S.P. (in liquidation) and REPUBLIC OF COLOMBIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the New York Convention, a district court has the discretion not to enforce an arbitration award that has been set aside by a court of the country where the award was made. Did the District Court abuse that discretion in refusing to enforce an award already set aside by Colombia's highest court, when the party seeking enforcement did not allege that the Colombian decision was corrupt or similarly improper, but alleged only that it was wrongly decided?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Electrificadora Del Atlantico S.A. E.S.P. ("Electranta") and the Republic of Colombia ("Republic") hereby state that Electranta was a public utility company established by the Republic and was majority-owned by the Republic. It had no owners in the United States. Electranta was in the process of liquidation while the matter was proceeding in the District Court and was so identified in the Amended Complaint. The entity has since been liquidated. Its assets are controlled by a trust named Patrimonio Autonomo Electrificadora del Atlantico and the trustee is Fiduciaria La Previsora S.A.

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STATEMENT OF THE CASE

I. Introduction

This case arises from a dispute under a contract between two Colombian companies, Electranta and TermoRio S.A. E.S.P. ("TermoRio"), to buy and sell electrical power in Colombia. The parties agreed to be bound by Colombian law. A Colombian arbitration panel issued an award in favor of TermoRio. TermoRio filed 2 different lawsuits in the Colombian courts seeking to enforce the award against both Electranta and the Republic itself, while Electranta moved before the Colombian courts to set aside the award. In December 2000, the Council of State, Colombia's highest administrative court, vacated the award on the grounds that the arbitration violated Colombian law in effect at the time of contracting. Colombian law, at that time, prohibited instrumentalities of the Colombian government from using the arbitration processes of the International Chamber of Commerce ("ICC") to resolve disputes.

After the award was vacated, and while one of the lawsuits filed by TermoRio in Colombia was still pending, TermoRio and an American shareholder, LeaseCo Group, LLC ("LeaseCo"), filed suit in the District Court for the District of Columbia. The plaintiffs asked that the court enforce the now-vacated award and that the award be entered against the Republic itself under a theory of "veil-piercing." The plaintiffs further alleged that Electranta and the Republic had breached the underlying contract with TermoRio and had fraudulently conveyed Electranta's assets, and that the Republic had been guilty of "expropriation" in its nationalization of Colombian utilities.

Electranta and the Republic moved to dismiss the case under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] ("Convention"), 9 U.S.C. § 201; the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605; the doctrine of forum non conveniens; and the statute of limitations, among other grounds. The plaintiffs stipulated to the dismissal of the expropriation claim and the fraudulent conveyance claim, leaving only the breach of contract claim and the arbitration award enforcement.

In a lengthy written decision, Senior District Judge Oberdorfer dismissed the claim seeking enforcement of the award because the award had been vacated by Colombia's highest court under Colombian law, and because TermoRio did not allege any facts which, if proven, would cause the court to disregard the Colombian court's decision. The District Court further ruled, in the alternative, that the enforcement claim lacked virtually any connection to the United States, and should therefore be dismissed under the doctrine of forum non conveniens. The Court also dismissed the remaining breach of contract claim.

The Court of Appeals affirmed the District Court's dismissal for failure to state a claim, but did not reach the issue of whether the claim should also be dismissed on forum non conveniens grounds. Hewing to the analysis employed by the Second Circuit, the District of Columbia Circuit held that the Convention mandates

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997.

different regimes for review of arbitral awards, depending on which is the "primary" court. A court in the country in which the award is made — as the "primary" court — can set aside an arbitral award in accordance with its domestic arbitral law. By contrast, a court asked to enforce an arbitral award issued in another country is required to enforce the award unless the party opposing enforcement can satisfy one of a limited number of exceptions to enforcement set forth in Article V of the Convention. One exception to enforcement is when an award has been vacated by a court in the country where the award was rendered. (Pet. App. 84 (Art. V(1)(e)).)

Here, Colombia's highest court vacated the award based on its conclusion that the arbitration was convened in a way that violated Colombian law. That decision by the court in the "primary" state is permitted under the Convention. The District Court, as the enforcement court for the "secondary" state, could, and did, honor the decision of the primary court on the question of the primary state's domestic arbitration law.

This Court should not grant a writ of certiorari. The decisions below were correct. The District Court had discretion to deny enforcement of the vacated arbitral award. It did not abuse its discretion in choosing to defer to the Council of State's determination and application of Colombian law. Moreover, there is no split in the Circuits. The Court of Appeals decision is consistent with the only other circuit court decision addressing the enforcement of a foreign arbitral award vacated by the court in the country in which the award was made. This

case does not present an important unsettled area of federal law requiring Supreme Court guidance. Rather, this case is a domestic Colombian dispute which raises no important federal issues. Finally, the unique facts of this case make it an inappropriate one for review by this Court. Unlike a typical enforcement action, the petitioners here seek both to "reinstate" a vacated award and to extend and enforce the award against a non-party. Both inquiries would require the United States courts to delve deeply into issues of Colombian law and adjudicate facts arising entirely in Colombia. The District Court's dismissal on forum non conveniens grounds was a sound exercise of discretion, and provides an independent reason why the dismissal should not be disturbed, and why a writ of certiorari should not be granted.

Because the decision below is correct, is limited by its unique record, and creates no inter-circuit conflict, this case presents no question that justifies review.

II. Factual Background

The facts in this case are carefully set forth in the District Court's Memorandum opinion, (Pet. App. 30-34), and are incorporated herein by reference.

III. Proceedings Before the United States Courts

A. District Court Litigation

After the Council of State vacated the arbitral award, TermoRio filed suit in the United States District Court

for the District of Columbia against Electranta and the Republic. TermoRio's amended complaint asserted four causes of action: (i) a claim to enforce the vacated arbitral award; (ii) a breach of contract claim; (iii) a fraudulent conveyance claim; and (iv) an expropriation claim. Pursuant to stipulation, TermoRio subsequently dropped its fraudulent conveyance and expropriation claims, leaving only the arbitration award enforcement claim and the breach of contract claim. (Pet. App. 35.) The parties filed extensive briefing papers, including affidavits and documentary evidence regarding the Colombian litigation.

The District Court dismissed the breach of contract claim on the grounds that the court lacked subject matter jurisdiction over that claim under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, and also on the alternative grounds that the breach of contract claim was barred by the applicable statute of limitations. (Pet. App. 42-48.)

The District Court dismissed the claim for enforcement of the vacated arbitral award because the award had been vacated by Colombia's highest administrative court under Colombian law and there was no reason not to recognize that decision. TermoRio did not allege that the Colombian courts were corrupt; TermoRio did not have facts to suggest that the Colombian court's decision was repugnant to American public policy. (Pet. App. 56-60.) The District Court carefully considered both the substantive basis of the Colombian court's decision and TermoRio's criticism of that decision. *Id.* at 58-60.

The District Court also ruled, as alternative grounds for dismissal of both remaining counts of TermoRio's amended complaint, that the claims lacked virtually any connection with the United States, and should therefore be dismissed under the doctrine of forum non conveniens. *Id.* at 60-63.

The District Court further ruled that LeaseCo, as a stockholder of a stockholder of TermoRio, lacked standing to bring suit. *Id.* at 37-39.

B. Appeal to Court of Appeals

TermoRio appealed the dismissal of its claim for enforcement of the vacated arbitral award to the Court of Appeals for the District of Columbia Circuit, but failed to appeal the dismissal of its breach of contract claim. The Court of Appeals affirmed the dismissal on the grounds that it failed to state a claim, but did not address whether dismissal was also warranted on the grounds of forum non conveniens.[2]

IV. TermoRio's Misstatement of the Questions Presented

Pursuant to Supreme Court Rule 15.2, Respondents submit that Petitioners have materially misstated the rulings below.

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[2] The Court of Appeals also stated that it was not necessary to resolve the issue of whether LeaseCo had standing to appeal. (Pet. App. 7-8.) Thus, before this Court, LeaseCo appears as a petitioner only in its capacity as successor-in-interest to TermoRio, *see* Pet. at ii, and not as a petitioner in its own right regarding its claims which were dismissed by the District Court.

The first *Question Presented* by TermoRio – "[In deciding] whether to defer to a foreign court proceeding nullifying an international arbitral award, is a United States court required to ignore the substantive basis of the foreign nullification decision and address only the question of whether the nullification proceeding was procedurally 'tainted'?" – materially mischaracterizes both the record and the decisions of the courts below.

TermoRio mistakenly describes the Colombian court's decision as an annulment of an "international arbitral award." (Pet. at i.) On the contrary, this was a purely domestic arbitration. In fact, the District Court labeled it "a peculiarly Colombian affair," because it was a dispute involving two Colombian parties over a contract to perform services in Colombia in which the parties agreed to be bound by Colombian law. (Pet. App. 23, 60.) The dispute only became "international" when TermoRio, disappointed by the Colombian court's annulment decision, attempted to enforce the award in the United States.

Further, the District Court *did not* hold that it was "required to ignore the substantive basis" of the Colombian court's decision. In fact, the District Court carefully considered the substantive basis of the decision, and also carefully considered the criticism of that decision contained in the affidavits of a Colombian lawyer and an American law professor submitted by TermoRio in support of its claim. *Id.* at 58-60. Noting that TermoRio's own expert conceded that Colombian law did not allow the parties to agree to the arbitration process

that was employed, the District Court found that the Colombian court's decision was "plausible on the merits," and ruled that even if the Colombian court had made a mistake in its legal reasoning, such a mistake would not be a sufficient reason for the District Court to refuse to enforce the decision. *Id.*

The second *Question Presented* by TermoRio – "Should a United States enforcement court defer to a foreign nullification decision where that decision is based on grounds that the Convention expressly excludes as a defense to enforcement?" – is based on an inaccurate recitation of the terms of the Convention. The Convention does not purport to limit the grounds on which a court may nullify a domestic arbitral award. Just as it does not supersede the Federal Arbitration Act with respect to the grounds on which a United States court may nullify an arbitral award issued in this country, it does not purport to affect the comparable law of other signatory nations regarding the grounds for setting aside an award in those signatory nations.

TermoRio's mischaracterization of the decisions below might make the petition sound more "certworthy." But the *Questions Presented* are fundamentally skewed and do not provide a reliable analysis of the actual issues. As discussed in the next section, the answer to the actual question presented by this case is clear-cut under existing law and therefore does not warrant additional review by this Court.

REASONS FOR DENYING THE PETITION

I. The District of Columbia Circuit's Decision is Correct

The District Court's decision not to enforce the nullified award, and the Court of Appeals' affirmance of that decision, were well-grounded in the Convention and fully supported by the facts of this case.

Both the United States and Colombia are signatories to the Convention, which provides that signatory nations are to recognize and enforce arbitral awards rendered in other nations. (Pet. App. 81 (Art. I(1)).) However, Article V(1)(e) of the Convention expressly recognizes that the enforcement of an award "may be refused" upon proof that the award was set aside by competent authority in the country in which the award was made. *Id.* at 83-84.

After exhaustively analyzing both the appropriate sections of the Convention and established precedent, the District Court correctly held that when a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances, and that such circumstances were not present in this case. *Id.* at 56. *See also Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd.*, 191 F.3d 194 (2d Cir. 1999); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999).

There was no question that Article V(1)(e) applied to this situation, since the Colombian court had already

set aside the award before TermoRio sought enforcement. But the District Court did not simply rubber-stamp the nullification of the award. Rather, in exercising its discretion, the District Court carefully analyzed the Colombian court decision and enumerated several reasons why the annulment decision was "not repugnant to" U.S. public policy. (Pet. App. 56.) First, TermoRio had previously invoked the Colombian courts to enforce its award. The District Court aptly noted that this fact alone "suggests considerable confidence and trust in the Colombian court system." *Id.* at 57. Second, TermoRio's contention that the Colombian court was looking for *any* reason to nullify the award was incongruent with the Colombian court's detailed review and ultimate rejection of Electranta's other arguments for vacating the award. *Id.* at 59. The Colombian court's decision is 92 pages long and offers a detailed analysis of Colombian law and legal principles. (*See* J.A. 173-266.)[3] Ultimately, that court rested its decision on Colombian law, not on a "second-guess" of the merits of the arbitration itself. Further, TermoRio concededly did not present any evidence of corruption, bribery, or coercion of Colombian judges leading to rulings adverse to TermoRio. *Id.* at 1026:11-18, 1071-72. As Judge Oberdorfer properly concluded on this subject:

> [I]t takes much more than an allegation that a decision was results-oriented to demonstrate that it was "repugnant," particularly when, as

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[3] "J.A." refers to the Joint Appendix filed in the appeal before the Court of Appeals for the District of Columbia Circuit.

> here, the decision seems plausible on the merits. Consistent with *Ingenohl [v. Olsen & Co.*, 273 U.S. 541 (1927)] a determination that the Colombian court made a clear mistake is not sufficient to refuse to enforce it.

(Pet. App. 59-60.)

In its petition, TermoRio argues that the Court of Appeals "abdicated its responsibility to consider the substance of the [Colombian court's] decision." (Pet. at 16.) It erroneously contends that the Colombian court contravened the Convention when it applied Colombian domestic law to invalidate the parties' arbitration. Accordingly, TermoRio is asking the Court to adopt a rule requiring federal courts to look behind foreign judgments based on foreign law to see if the judgment conflicts with the principles underlying the Convention. Such a rule is untenable. It would distort the Convention, disregard settled principles of law, and upend fundamental notions of comity.

Contrary to TermoRio's contention, the Convention does not supplant the laws of the country where the arbitration award is made (the primary state). (Pet. App. 81 (Art. I(1).) Indeed, the Convention makes clear that "the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law." *Yusuf Ahmed Algahanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997); *see also Kahara Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287-88 (5th Cir. 2004). The Convention therefore envisions occasions where the primary state will vacate

an award on grounds that are not consistent with the laws and policies of the state where enforcement is sought (the secondary state). (Pet. App. 18.) Notwithstanding any conflict of laws, Article V(1)(e) of the Convention expressly permits a secondary state to defer to a primary state's nullification decision.[4] *Id.* at 84.

In affirming the District Court's decision to defer to the Colombian court, the Court of Appeals reviewed carefully TermoRio's claim, and applied the correct standard in assessing the relative roles of the federal court and the foreign court:

> [A]ppellants are simply mistaken in suggesting that the Convention policy in favor of enforcement of arbitration awards effectively swallows the command of Article V(1)(e). A judgment whether to recognize or enforce an award that has not been set aside in the State in which it was made is quite different from a judgment whether to disregard the action of a court of competent authority in another State. . . . The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment

[4] Indeed, Article VI of the Convention expressly authorizes an enforcement court to "adjourn" its consideration of the enforcement request if there is an application pending before a competent authority in the primary state to set aside the award. (Pet. App. 85.) There would be no reason to "adjourn" an enforcement action unless the Convention anticipated that the enforcement court should be guided by the conclusion of the primary state's court.

> of a court in a primary State, when the court in the primary State has lawfully acted pursuant to "competent authority" to "set aside" an arbitration award made in its country.

Id. at 18-19.

Because the District Court did not abuse its discretion in deferring to the Colombian court's application of Colombian law and because TermoRio offered no sufficient basis to establish that the annulment decision was repugnant to U.S. public policy, the Court of Appeals correctly affirmed the District Court's dismissal for failure to state a claim.

II. There is No Inter-Circuit Conflict

In affirming the District Court's decision, the Court of Appeals noted and followed the reasoning of the Second Circuit, the only other court of appeals to consider this issue. (Pet. App. 15.) In *Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd.*, 191 F.3d 194 (2d Cir. 1999), a litigant tried to enforce an arbitration award in a New York district court. The award was entered in Nigeria but had been set aside by a Nigerian court based on Nigerian law. *Id.* at 195-96. Even though the Nigerian court had set aside the award on grounds that would not have applied in an American court, the Second Circuit declined to enforce the award. It reasoned

that to do otherwise would encourage losing parties to shop around for a favorable forum:

> [A]s a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary "with enforcement actions from country to country until a court is found, if any, which grants the enforcement."

Id. at 197 n.2 (*quoting* Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 355 (1981)). *See also Spier*, 71 F. Supp. 2d at 286.

The District Court had before it a decision by Colombia's highest court that the composition of the arbitral authority violated Colombian law and that the resulting award should be set aside. (J.A. 19-20, ¶ 33; 242-57 & 265-66.) In affirming the District Court, the Court of Appeals correctly noted that the Council of State is the final expositor of Colombian law and that the District Court did not abuse its discretion under the Convention when it refused to second-guess that decision. (Pet. App. 23.)

TermoRio acknowledges that the District of Columbia is the only proper forum for comparable enforcement proceedings in the future, namely enforcement actions against foreign governments or the instrumentalities of those governments. (Pet. at 26.) But because there is no actual inter-circuit conflict, or any apparent threat of one, and because the decision of the Court of Appeals is correct, this case does not present a compelling basis to grant certiorari.

III. This Case Does Not Satisfy Other Traditional Certiorari Criteria

TermoRio claims that its petition raises an "important question of federal law that has not been, but should be, settled by this Court." (Pet. at 24.) It insists that foreign venturers will have no assurance that their arbitration agreements will be honored unless U.S. courts are required to substantively review a foreign court's nullification decision to ensure it is consistent with the Convention.

This argument turns the Convention on its head and calls for an unprecedented expansion of the federal judiciary's role into the application of foreign law by foreign courts. The Convention governs the enforceability of arbitration awards in countries other than where the award was issued. (Pet. App. 81 (Art. I(1)).) The Convention limits the grounds on which a court may refuse to enforce an arbitral award issued in another country under that country's laws. *Id.* at 83-84 (Art. V). It does not, however, purport to limit the ability of the forum country's courts to review arbitration awards under the forum's domestic arbitration laws.

A competent court in the country where the award is issued may set aside that award for any reason consistent with its laws. And the Convention expressly permits a court in the country where enforcement is sought to defer to the forum court's nullification decision. *Id.* at 84 (Art. V(1)(e)). As the Court of Appeals correctly noted, the Council of State is "the final expositor on Colombian law and we are in no position to pronounce the decision of that court wrong." *Id.* at 23. Accordingly, any endorsement of what TermoRio seeks in its petition would undermine the Convention and seriously undercut fundamental notions of comity.

Moreover, up until the time that TermoRio sought its "second opinion" in the District of Columbia, this case did not present any federal issue whatever. This was a Colombian domestic dispute that TermoRio sought to federalize after the award was vacated and after its earlier efforts to secure relief in Colombia were thwarted. There is simply no urgent federal law issue at stake here nor are these facts likely to be replicated in future cases.

IV. This Case Is An Inappropriate Vehicle for Supreme Court Review

Even assuming there were important unsettled federal law issues surrounding the Convention, this case is an inappropriate vehicle in which to decide them. In assessing a petition, the Court presumably tries to weed out cases where matters outside the issue presented would moot or render meaningless the Court's efforts.

Here, there are several factors that make this case an inappropriate occasion for the use of the Court's limited time and resources.

A. Forum non conveniens dismissal remains in place

The District Court ruled, in the alternative, that the complaint should be dismissed on the grounds of forum non conveniens. (Pet. App. 60.) The issues that would have to be tried in connection with TermoRio's efforts to restore the vacated arbitral award and pierce the corporate veil so as to hold the Republic liable for the obligations of its instrumentality, would be governed by Colombian law, and would require detailed analysis of actions of Colombian government officials taken in Colombia. TermoRio conceded that its case would be difficult to try in the United States. *Id.* at 63. The parties and witnesses are all from Colombia, the documents are in Spanish, and the case concerns a Colombian contract, governed by Colombian law. *Id.* The District Court correctly reasoned that this "peculiarly Columbian affair" should be adjudicated in that country, where there was an adequate forum. *Id.*

An order dismissing a case on forum non conveniens grounds is reversed only when there has been a clear abuse of discretion. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). In affirming the dismissal, the Circuit Court found it unnecessary to reach this alternative holding. (Pet. App. 8.) But during oral argument, one circuit judge expressed the view that TermoRio would have "an unbelievably difficult time in getting a reversal ... unless the District Court is just

completely off the [wall] in citing the factors, and the factors here seem well within the District Court's discretion to say this [case] is not appropriately here." (2/12/07 Tr. at 11:9-13; *see also id.* at 13:18-20 (referring to the "unbelievably tough abuse of discretion standard to prevail on" in light of the District Court's consideration of the forum non conveniens factors).)

Respondents agree that it would be "unbelievably difficult" to reverse the ruling on forum non conveniens if this case were remanded to the Court of Appeals. The viability of the alternative dispositive ruling, which is not before this Court, would cause the matter to be dismissed on remand. Failing to recognize this problem at the outset – and TermoRio fails to address it at all – could result in "bringing to naught the parties' briefing and arguments, and the Justices' deliberations." *Roper v. Weaver*, __ U.S. __, 127 S.Ct. 2022, 2026 (2007) (Scalia, J., dissenting from order dismissing writ as improvidently granted).

B. TermoRio's inconsistent positions have left a muddled record for review

Not only does this case have procedural problems, but there are record inconsistencies that make this case an inappropriate vehicle for resolving the questions that TermoRio has framed.

As discussed above, TermoRio has taken inconsistent, exaggerated, and simply incorrect positions as this matter has proceeded from initial filing, through district court and circuit court review. Along the way,

TermoRio has conceded significant points that would complicate Supreme Court review if a complete record were assembled and full briefing were ordered.

For example, before the Court of Appeals, TermoRio conceded that it was not challenging the propriety of the Colombian court's nullification of the arbitration award. (2/12/07 Tr. at 5, 8.) Now, TermoRio contradicts its earlier position by stating that the Colombian court "improperly" nullified the award. (Pet. at 26.) This Court does not have a clean record of TermoRio's precise position regarding the role of the Colombian court.

TermoRio hints to this Court that there was something scurrilous in the ruling of Colombia's highest court. *See*, *e.g.*, *id.* at 25 (minimizing the Colombian decision by describing it as a proceeding "free of overt procedural 'taint'"). But TermoRio acknowledged to the District Court that it did not have evidence of illegality or corruption in the conduct of the Colombian court proceedings. (Pet. App. 59.) TermoRio cannot have it both ways.

In sum, this case is not one where the record crisply defines a discrete issue requiring Supreme Court review. To the contrary, the full record will appear a mishmash of claims, arguments, and issues advanced by TermoRio, and will not be an appropriate vehicle for resolving questions under the Convention.

C. TermoRio's arguments would open the federal courthouse doors to significant entanglements with foreign courts

TermoRio's argument is that under the Convention, the federal courts become mandatory "courts of last resort" for international arbitration participants to vet their arguments about whether awards can be set aside by competent courts in other countries. In front of the Circuit Court, TermoRio described that role as requiring the federal court to "peel[ ] back the layers of this nullification decision to see what it really is." (02/12/07 Tr. at 9:4-5.) In this Court, TermoRio warns that foreign venturers will view the D.C. Circuit decision as meaning that "no United States court will step in to guarantee their Convention rights." (Pet. at 25.)

TermoRio is arguing for an unprecedented expansion of the federal judiciary's role into the application of foreign law by foreign courts. Nothing in the Convention supports the view that an American court must analyze how a foreign court interpreted its own (foreign) arbitration laws at the behest of a party that lost that argument in that foreign forum.

But even if someone had a plausible basis for pursuing this novel argument, TermoRio has no basis for pursuing it on this record. It is plain that the District Court applied the correct standard and satisfied itself that the Colombian court's decision was "plausible on the merits." (Pet. App. 59.) Other than the affidavits of a Colombian lawyer and an American law professor who were critical of the Colombian court decision, TermoRio proffered no evidentiary basis for a federal court to

"peel back the layers." This is not a case in which a party submitted a record sufficient to support the legal argument it now advances. The Court would find itself rendering an unnecessary and advisory opinion on an incomplete record.

CONCLUSION

The District Court's exercise of its discretion not to enforce a foreign arbitration award nullified by a competent foreign court was properly affirmed, and the District of Columbia Circuit is in accord with the only other court of appeals to consider this issue. For all the reasons discussed above, the petition for certiorari should be denied.

Respectfully submitted,

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